IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-317

O-J TRANSPORT COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents,

and

ASSOCIATED TRUCK LINES, INC., BLUE ARROW-DOUGLAS, INC., CENTRAL TRANSPORT, INC., MICHIGAN EXPRESS, INC., EXPRESS FREIGHT LINES, INC., GREAT LAKES EXPRESS COMPANY, INTERSTATE MOTOR FREIGHT SYSTEM, R-W SERVICE SYSTEM, INC., AND COURIER-NEWSOM EXPRESS, INC.,

Intervenors.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I. HUNCE NAIMAN,
JOEL H. STEINER,
Attorneys for Intervenor Respondent Courier-Newsom Express, Inc.

Of Counsel:
AXELROD, GOODMAN, STEINER & BAZELON,
39 South LaSalle Street,
Chicago, Illinois 60603,
312/236-9375.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-317

O-J TRANSPORT COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents,

and

ASSOCIATED TRUCK LINES, INC., BLUE ARROW-DOUGLAS, INC., CENTRAL TRANSPORT, INC., MICHIGAN EXPRESS, INC., EXPRESS FREIGHT LINES, INC., GREAT LAKES EXPRESS COMPANY, INTERSTATE MOTOR FREIGHT SYSTEM, R-W SERVICE SYSTEM, INC., AND COURIER-NEWSOM EXPRESS, INC.,

Intervenors.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT OF THE CASE.

Petitioner's statement of the case is basically correct but requires minor clarification to present an accurate picture of the course of the proceedings below.

Petitioner makes mention of the testimony of the three shippers who supported the portion of its application which was denied by the Interstate Commerce Commission. In this discussion, Petitioner fails to note that no weight was given to the testimony of the General Motors witnesses by the Administrative Law Judge who heard the case, or by Division One of the Interstate Commerce Commission which subsequently reviewed the proceedings. Petitioner's recitation of the evidence offered by shippers Ford and AMC, concerning alleged deficiencies in existing carrier services, is an almost verbatim repetition of the record and not a summary of the evidence offered by these shippers. There was no specific evidence relating to this issue.

Further, Petitioner fails to acknowledge that Commissioner O'Neal, in his dissent, concurs with Commissioners Murphy and Gresham that the issue of minority group status should have no bearing on the present case. (See Page A-17 of O-J's Petition.)

With the inclusion of the foregoing clarifications, Petitioner's statement of the case can be considered correct and accurate and adopted by respondent Courier-Newsom as so clarified.

REASONS FOR DENYING THE WRIT.

Although Petitioner challenges the Commission's decision denying it a portion of the operating authority it sought on many grounds, contending that the Commission's decision is arbitrary and capricious and not supported by substantial evidence, Petitioner's primary argument is now, as it has been at all stages of this proceeding, that the Commission should have considered the factor of the minority ownership of Petitioner as an additional basis for granting the operating authority sought. This Court very recently rejected the type of argument presented by Petitioner herein in the case of *National Association for the Advancement of Colored People* v. *Federal Power Commission,* ..... U. S. ....., 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976).

I. The Scope of Judicial Review of Interstate Commerce Commission Decisions Is Extremely Limited.

A court's review of Interstate Commerce Commission action is limited to ascertaining whether the Commission's decision was rational and based upon substantial evidence. *Dart Transit Company* v. *United States,* 386 F. Supp. 1387 (1975) D.C.M.N.; *Ross Express, Inc.* v. *United States,* 529 F. 2d 679 (1976) CA1. If there is support in law and in fact for the Commission's action, the court cannot substitute its own judgment for that of the Commission. *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 90 L. Ed. 821 (1946). The judicial function is exhausted when there is found to be a rational basis for the Commission's conclusions. Reviewing courts have no concern with the correctness of the Commission's reasoning, the soundness of its conclusions or with alleged inconsistencies with findings made in other proceedings. The weight to be given to evidence is to be determined by the Commission and not by the courts. There is a presumption that the Commission has properly performed its duties. *Norfolk Southern Bus, Corp.* v. *United States,* 96 F. Supp. 756 (1950), affirmed per curium, 340 U. S. 802.

As was stated by the three judge District Court in the case of *United Van Lines, Inc.* v. *United States,* 266 F. Supp. 586 (1967):

> "The criteria by which the I.C.C. chooses to make determinations of Public Convenience and Necessity may not be criticized by this Court unless they are found to be capricious or irrational. The scope given the I.C.C. is broad, and within this scope, the I.C.C. may choose criteria and weigh evidence of Public Convenience and Necessity as it sees fit."

indeed:

> "The fact that there is substantial evidence for other conclusions is not decisive (citation omitted). We are con-

cerned only with whether or not the evidence presented will support the conclusions actually reached by the I.C.C."

United Van Lines, supra.

Reviewing courts have consistently found that an Order of the Interstate Commerce Commission carries with it a presumption of validity and does not become suspect merely because it has been challenged. See: *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 512 (1944.)

II. The Interstate Commerce Commission's Decision in the Instant Case Is Supported by Substantial Evidence.

Petitioner contends that the Commission's decision is not supported by substantial evidence and buttresses this contention with the assertion that, contrary to law, the only factor considered by the Commission in its determination of the Petitioner's application was the adequacy of existing carrier services. The United States Court of Appeals for the Sixth Circuit found no merit to these contentions. See: *O-J Transport Company* v. *United States*, 536 F. 2d 126 (1976.)

The fact of the matter is that the adequacy or inadequacy of existing service is one of the several elements upon which the Commission may base its exercise of discretion in granting a Certificate of Public Convenience and Necessity. See: *Warren Transport, Inc.* v. *United States*, 525 F. 2d 148, 149 (1975) CA8.

The Commission's determination that existing carrier services were adequate to meet the shipping public's need is well founded. The record contains no specific complaints regarding the services of existing carriers but rather only broad allusions to the effect that carrier service might be better. As the Commission held in the case of *Chullino, Common Carrier Application*, 112 M. C. C. 737, 743:

> "A need for additional service is not established by general allegations of unsatisfactory service unaccompanied by evidence of specific instances of actual service failures."

Rather, the Commission requires that an applicant furnish specific examples of inadequacies in existing service in order to establish a *prima facie* case. *Jerry Lipps, Inc., Extension—Pipe*, 110 M. C. C. 113, 119. The Commission requires that there be an affirmative showing of a need for service based upon evidence of consistent or recurring inability to secure adequate and satisfactory service from existing carriers. *Wingate Trucking Company, Inc., Extension—Dogherty County*, 105 M. C. C. 475, 479. Petitioner herein made no such showing to the Commission.

The record before the Commission reflects that there is nothing new, unique or inherently superior about the service proposed by Petitioner herein when compared with the services presently available from existing motor carriers. All that the Commission was presented with was an apparent preference on the part of the shippers supporting Petitioner's application for Petitioner's service over that of existing carriers. As was held in the case of *Strickland Transportation Co., Inc., Purchase, New England Transportation Co.*, 104 M. C. C. 296, 325:

> "Preference is not a substitute for need where an area is served adequately by established carriers. The mere showing by an applicant of its own fitness and of the shipper's desire to use its proposed service are not sufficient of themselves to warrant a grant of authority sought . . ."

The Commission, in the case of *John Novak Contract Carrier Application*, 103 M. C. C. 555, established certain evidenciary standards or guide lines with which all applicants must comply in order to establish a *prima facie* case. These criteria require an applicant to set forth with specificity; the commodities to be shipped or received, the points to or from which traffic moves, what volume of traffic the supporting shippers would tender to the applicant if successful in its prosecution of the application, what transportation services the supporting shippers are currently utilizing, and what deficiencies, if any, there are in existing carrier services. These criteria were made applicable to

common carrier applications in the case of *Cloud Common Carrier Application,* 115 M. C. C. 77, 79 and later judicially approved and made applicable to cases heard on an oral record. See: *Richard Dahn, Inc.* v. *Interstate Commerce Commission,* 335 F. Supp. 337 (1971). These *Novak* criteria have found further judicial approval in the cases of *Dart Transit, Co.* v. *United States,* 386 F. Supp. 1387 (1975) and *Ross Express, Inc.* v. *United States,* 529 F. 2d 679, 682 (1976) CA1.

The requirements of *Novak, supra,* are a minimum showing which must be made by an applicant in order to establish a *prima facie case.* All five minima are required, not any one or any combination short of the five. If an applicant's presentation is deficient insofar as any of the five *Novak* criteria are concerned, the application must be denied. See: *Little Audry's Transportation Co., Inc., Extension—Frozen Foods,* 120 M. C. C. 467, 475. The record which Petitioner made before the Commission is woefully deficient insofar as the *Novak* criteria are concerned. Petitioner's failure to meet its burden of proof left the Commission in a position where it did not have before it substantial evidence upon which it might have justified a decision to grant the authority Petitioner sought.

It is the Commission's duty to determine whether a newly proposed service will serve a useful public purpose responsive to a public demand or need, whether this purpose can be as well served by existing carriers and whether it can be served by applicant with the new operation proposed without endangering or impairing the operations of existing carriers. See: *Pan American Bus Lines Operation,* 1 M. C. C. 190, 203. As noted above, there was no demonstration of any public demand or need which Petitioner's proposed service was tailored to meet. Moreover, the record before the Commission reflects that existing carriers experience an imbalance of traffic terminating in the Detroit area and have a need for additional traffic outbound from Detroit to balance their operations. The Commission recognized that the authorization of Petitioner to

conduct its proposed operations would impair the viability of the operations of existing carriers, contrary to the public interest.

Petitioner argues that the approval of its application would have a minimal effect upon existing carriers because it would be tendered a minimal amount of traffic by the shippers which supported its application. There is no guarantee that this would always continue to be the case and that Petitioner's operations would not grow. It would be impermissible for the Commission to place any restriction upon the growth of Petitioner's operations once it had approved Petitioner's application. The Commission previously rejected such an argument in the case of *Karl Weber, Extension—Lumber,* 112 M. C. C. 552, 556.

Petitioner argues that since the Ford Motor Company has offered evidence of traffic moving to Detroit from Chicago as well as from Detroit to Chicago, that the approval of its application will not have any significant affect upon the balanced or unbalanced nature of the operations conducted by existing carriers. By this argument apparently Petitioner is asking the Court to substitute its judgment for that of the Commission in the weighing of evidence, contrary to established legal principles. See: *United States* v. *Pierce Auto Freight Lines, Inc., supra,* and *Norfolk Southern Bus Corp.* v. *United States, supra.*

There can be no doubt as to correctness of the finding by the U. S. Court of Appeals for the Sixth Circuit that the Commission's denial of Petitioner's application was supported by substantial evidence when viewing the record as a whole. In fact, the conclusion reached by the Commission is the only one which the record will support.

III. The Interstate Commerce Commission's Decision in the Instant Case Is Not Arbitrary or Capricious.

As this Court stated in the case of *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U. S. 281, 42 L. Ed. 2d 447, 95 S. Ct. 438 at 419 U. S. 285:

> "Under the 'arbitrary and capricious' standard the scope of review is a narrow one. . . . the Court is not empowered to substitute its judgment for that of the agency."

This court went on to state at pages 285 and 286 of its decision in *Bowman, supra,* that:

> "The agency must articulate a 'rational connection between the facts found and the choice made.' (citation omitted.) While we may not supply a reasoned basis for the agency's action that the agency itself has not given (citation omitted), we will uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned. (citation omitted)"

There was no error in judgment on the part of the U. S. Court of Appeals for the Sixth Circuit in finding that the record discloses in the Commission's findings, a weighing of competing interests in a determination that the adverse affect upon existing carriers would outweigh any benefit to the public if Petitioner's application had been approved. As the Circuit Court noted, this is precisely the type of judgment which the Commission is required to exercise. Clearly then, there was a rational basis for the Commission's denial of Petitioner's application for operating authority. Once a rational basis is found for the Commission's Order, then the Commission's action can be considered neither arbitrary nor capricious. See: *Messinger* v. *United States,* 300 F. Supp. 1336 (1969) and *Navajo Freight Lines, Inc.* v. *United States,* 320 F. Supp. 318, 320 (1970).

IV. In the Instant Case, Petitioner's Minority Group Status Is Not a Factor Which the Interstate Commerce Commission Could Have Properly Considered in Its Determination of Petitioner's Application for Operating Authority.

The main thrust of O-J's argument in its Petition to this Court is, as it has been since the inception of O-J's application, that because of the racial minority group membership of the owners of O-J, O-J is entitled to some special consideration

not given to other applicants for motor carrier operating authority.

Petitioner asserts that 49 U. S. C. § 307(a), which provides for the issuance of motor common carrier operating authority to the extent that a proposed service is or will be required by the present or future public convenience and necessity, is the basis upon which such special consideration of minority group applications can be predicated. It asserts that the public convenience and necessity will be best served when minority group members become the holders of motor carrier operating authorities and the effects of past discrimination against minorities in the business world are eradicated. Petitioner interprets the language "public convenience and necessity" found in 49 U. S. C. § 307(a) as a broad license for the Interstate Commerce Commission to promote the general public welfare.

This Court has recently rejected such an argument in the case of *National Association for the Advancement of Colored People* v. *Federal Power Commission,* ..... U. S. ....., 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976). At 48 L. Ed. 2d 291, this Court stated that:

> "This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.
>
> For example, in the case of the Interstate Commerce Commission, which is responsible for enforcing an act 'designed to assure adequacy in transportation service,' 'the term public interest is not a concept without ascertainable criteria, but has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and the best use of transportation facilities . . .' (citations omitted)."

Quite clearly then, there is nothing in the Interstate Commerce Act which authorizes the Interstate Commerce Commission to give special consideration to minority applicants, merely

because of their minority status, when such individuals come before the Commission seeking operating authorities.

Ethnic factors can only play a part in the issuance of new operating authorities when they relate to the transportation needs of the persons or groups which a proposed transportation service is designed to serve. As the Commission found in the case of *Elegante Tours, Inc. Broker Application,* 113 M. C. C. 156, 160:

> "Consistent with our statutory responsibilities, some grants of authority are made either where a need has been shown to serve a particular class of users of a proposed service or where it has been shown that a distinctive kind of service would fulfill a demonstrated need. That is to say, if existing services are not providing an adequate service to any segments of the public, a grant of authority to an applicant to cure this defect does not evince a descriminatory grant but is, instead a grant to provide a needed service."

The ethnic considerations involved in the instant case have nothing whatsoever to do with the transportation needs of any element of the shipping public. Rather, Petitioner argues that in 1935, when the Motor Carrier Act was initially made effective, existing motor carrier were issued certificates of authority without being required to prove that any public need for their services existed. Petitioner argues that since there were very few black owned businesses in 1935, including trucking companies. the Commission's regulation of the motor carrier industry has perpetuated the effects of economic discrimination against blacks, and, accordingly the Commission should now be required to give special consideration to black applicants for motor carrier operating authority. The flaw in this line of reasoning is that it was Congress, and not the Commission, which set the standards by which the Commission must regulate the motor carrier industry. The Congress, when it enacted 49 USC § 306(a), determined that anyone conducting operations as a common carrier by motor vehicle on June 1, 1935 could receive a certificate from the Commission to conduct such

operations as were conducted on that date, without having to prove a public need for such a service. If blacks have been unfairly excluded from ownership positions in the motor carrier industry, it has been by Act of Congress and not due to Commission policy in regulating the motor carrier industry. Quite clearly then, the relief which Petitioner seeks can come only from Congress.

Petitioner also points to certain language of the National Transportation Policy, found at 49 USC preceding § 301, in support of its argument that black applicants are entitled to special consideration when they come before the Commission seeking operating authorities. The pertinent portion of the National Transportation Policy provides:

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all models of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . ."

Petitioner grasps the language "fair and impartial regulation" as manifesting congressional intent that the Commission eradicate any racial inequities which may exist in the ownership of motor carrier operating authorities. There might be some merit to this argument if the National Transportation Policy ended after the words "impartial regulation", however, it does not. This language relates to equal treatment of all modes of transportation; rail, motor, water, etc.

This particular language of the National Transportation Policy imposes a duty upon the Commission to regulate all modes of transportation fairly and impartially so as to preserve the inherent advantages of each mode of transportation and not to favor one mode of transportation over another. See: *Atlantic Coast Line R. Co.* v. *United States,* 265 F. Supp. 549 (1967). Of particular interest to the case at hand is the observation

of the three judge District Court in *Atlantic Coast Line, supra,* that if any of the statutory provisions of the Interstate Commerce Act are unfair, it is for Congress to correct the unfairness.

Clearly then, in the instant case, Petitioner's minority group statuts is not a factor which could properly play any role in the Interstate Commerce Commission's determination of Petitioner's application for motor carrier operating authority.

CONCLUSION AND PRAYER.

When viewing the record as a whole, there is substantial evidence to support the Commission's denial of O-J's application. The Commission's denial of O-J's application was neither arbitrary nor capricious. Further, this Court has recently rejected an argument identical to that made by Petitioner, herein that the Commission is required to consider the public welfare in the general sense as it goes about its appointed task of implementing and enforcing the Interstate Commerce Act.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied by this Court.

Respectfully submitted,

I. HUNCE NAIMAN,
JOEL H. STEINER,
Attorneys for Intervenor Respondent
Courier-Newsom Express, Inc.

Of Counsel:
AXELROD, GOODMAN, STEINER
& BAZELON,
39 South LaSalle Street,
Chicago, Illinois 60603,
312/236-9375.